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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1943**

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**No. 246**

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**A. M. BYERS COMPANY,**

*Petitioner,*

*vs.*

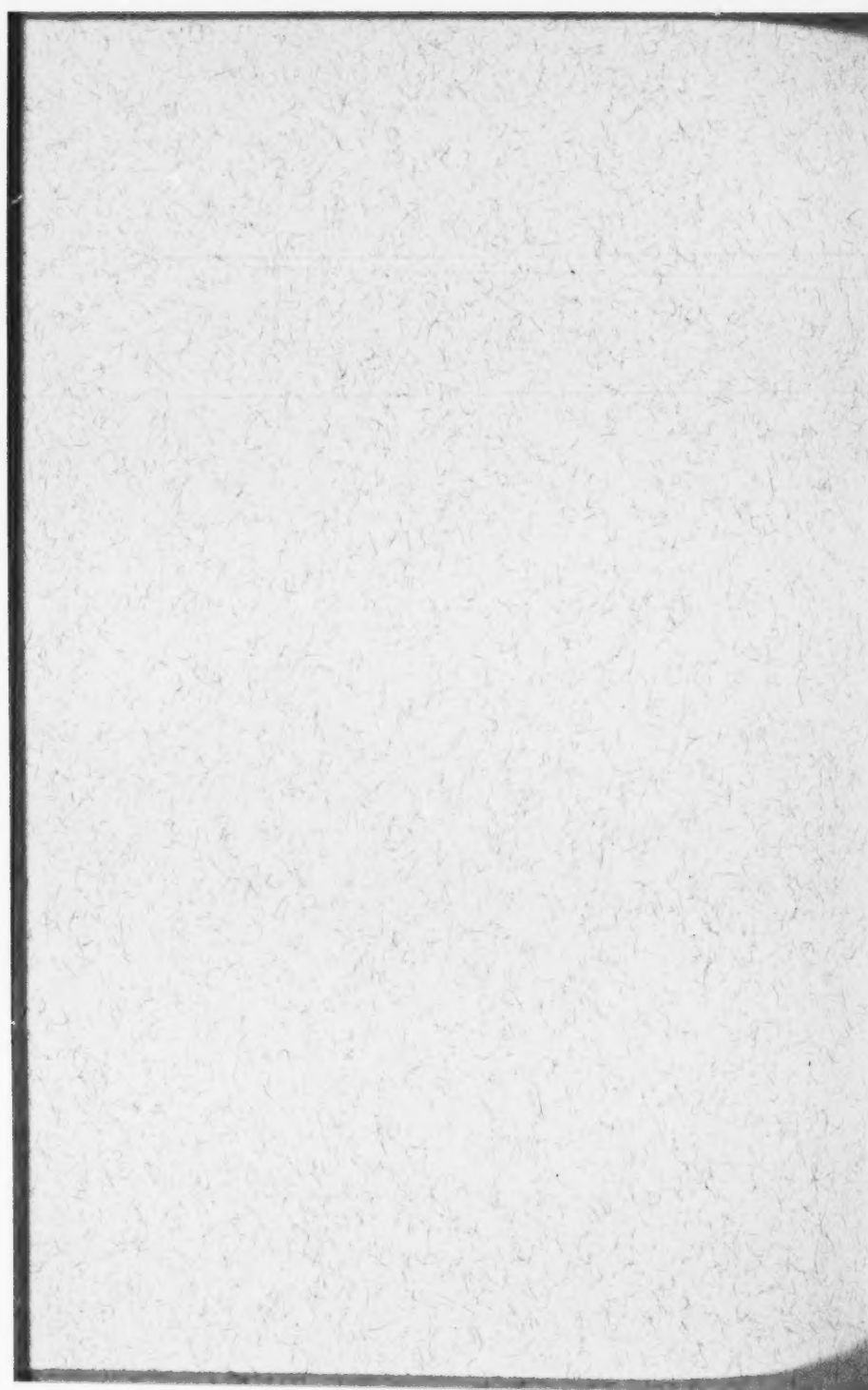
**COMMONWEALTH OF PENNSYLVANIA.**

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**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF PENNSYLVANIA AND BRIEF  
IN SUPPORT THEREOF.**

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**WILLIAM M. YOUNG,**  
*Counsel for Petitioner.*



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**SUPREME COURT OF THE UNITED STATES**

..... **Term, 1943**

No.....

**COMMONWEALTH OF PENNSYLVANIA**

**vs.**

**A. M. BYERS COMPANY,**  
*Petitioner.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF PENNSYLVANIA**

*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

A. M. Byers Company, a Pennsylvania corporation, Petitioner herein, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania, entered March 29, 1943, and the order of the Court refusing reargument, entered May 10, 1943, to No. 28 May Term, 1942, in said Court.

OPINION BELOW

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The Opinion of the Supreme Court of Pennsylvania, delivered by Associate Justice Sterne, is reported in 346 Pa. 555, 31 Atlantic Reporter, 2nd Series, page 530, and also appears in the record of the present proceedings (R. 253 to 257). The opinion of the Court entered March 29, 1943, reverses the decree entered by the Court of Common Pleas of Dauphin County. The opinions of the latter Court are reported in 51 Dauphin County Reporter, page 144, and 52 Dauphin County Reporter, page 167; they also appear in the printed record before the Supreme Court of Pennsylvania, filed herewith, pages 179a and 200a (R. 179a and R. 200a, respectively).

## JURISDICTION


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The order of the Court below, the Supreme Court of Pennsylvania, was entered March 29, 1943 (R. 253). Petition for Reargument filed in the same Court was denied May 10, 1943 (R. 257). The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended 28 U. S. C. 344 (b).

The question of violation of equal protection clause of the Fourteenth Amendment to the Constitution of the United States was raised in the Appeal from the decision of the Board of Finance and Revenue of Pennsylvania to the Court of Common Pleas of Dauphin County, Pennsylvania. Defendant's Exhibit 1, Paragraphs 3 and 4, pages 5a and 6a, printed record before the Supreme Court of Pennsylvania filed herewith (R. 5a, 6a); Appellant's Requests for Conclusions of Law, 13, which was initially "refused", and subsequently "affirmed", pages 168a and 169a, printed record before the Supreme Court of Pennsylvania, filed herewith (R. 168a, 169a); opinion of the Court of Common Pleas of Dauphin County, Pennsylvania, 51 Dauphin County Reporter, page 144, Conclusions of Law, 4; it also appears in the printed record before the Supreme Court of Pennsylvania, filed herewith, page 184a, and also appears in the record of the present proceedings (R. 184a); opinion of the Court of Common Pleas of Dauphin County, Pennsylvania on exceptions of A. M. Byers Company, 52 Dauphin County Reporter, page 167, and it also appears in the printed record before the Supreme Court of Pennsylvania, filed herewith, pages 200a to 203a; and also appears in the record of the present proceedings (R. 200a to 203a); the Commonwealth's exception 19 in the

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printed record before the Supreme Court of Pennsylvania, filed herewith, pages 211a, 212a, and also appears in the record of the present proceedings (R. 211a, 212a); opinion of the Supreme Court of Pennsylvania, 346 Pa. 555, 31 A. 2d 530, and also appears in the record of the present proceedings (R. 257).





## QUESTIONS PRESENTED

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1. Where the Department of Revenue of Pennsylvania granted permission to a Pennsylvania Corporation to file its Capital Stock Tax Report on a fiscal year basis beginning October 1, 1935 and said corporation filed its first report thereafter for the interim period from January 1, 1935 to October 1, 1935, in accordance with the provisions of the Act of the General Assembly of April 9, 1929, P. L. 343, 72 PS Sec. 702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 702, and subsequently said Department of Revenue revoked said permission but did not revoke fiscal year permissions granted prior to January 1, 1935 to Pennsylvania Corporations of the same class, thereby affording such corporations the manufacturing exemption from Pennsylvania Capital Stock Tax for the same period on and after January 1, 1935, but denying such right to corporations whose permission to file on a fiscal year basis were revoked as aforesaid, was such action by the Pennsylvania Department of Revenue unreasonable and discriminatory and in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as concluded by the Court of Common Pleas of Dauphin County, Pennsylvania, but denied by the Supreme Court of Pennsylvania?

2. Where the Department of Revenue of Pennsylvania granted permission to a Pennsylvania Corporation to file its Capital Stock Tax Report on a fiscal year basis beginning October 1, 1935 and said corporation filed its first report thereafter for the interim period from January 1, 1935 to October 1, 1935, in accordance with the provisions of the Act of the General Assembly of April 9, 1929, P. L. 343,

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72 PS Sec. 702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 702, and subsequently said Department of Revenue revoked said permission and refused to make a Settlement of Account for Capital Stock Tax for said interim period, January 1, 1935 to October 1, 1935 whereby manufacturing exemption from Capital Stock Tax for said period would have been afforded said corporation, but did not revoke fiscal year permissions granted prior to January 1, 1935, to corporations of the same class, thereby affording them the manufacturing exemption from Pennsylvania Capital Stock Tax for the same period on and after January 1, 1935, was such action of the Pennsylvania Department of Revenue unreasonable and discriminatory and in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States as concluded by the Court of Common Pleas of Dauphin County, Pennsylvania, but denied by the Supreme Court of Pennsylvania?

3. Does a decision of the highest court of the State, involving the construction of an Act of Assembly, the Fiscal Code, defining the powers and duties of the Department of Revenue, with respect to tax reports and tax settlements, violate the due process and the equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, when such construction is at variance with the mandatory provisions of the act, and contrary to decisions of similar questions by the Supreme Court of the United States?

## STATUTES INVOLVED

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The Fiscal Code of the Commonwealth of Pennsylvania, enacted April 9, 1929, P. L. 343, 72 PS Sec. 702, as amended by Act of June 1, 1931, P. L. 318, 72 PS 702, is the statute involved.

Section 2 of the Act provides:

“This act is intended to define the powers and duties of the Department of Revenue, the Treasury Department, the Department of the Auditor General, the Secretary of the Commonwealth, the Board of Finance and Revenue, \* \* \* with respect to the collection of taxes and other moneys due the Commonwealth \* \* \*.”

Section 2 of the Fiscal Code of April 9, 1929, P. L. 343, 72 PS 2.

Section 702 of the Fiscal Code had not been interpreted by any Court of record of the Commonwealth of Pennsylvania, prior to the instant case.

The Court of Common Pleas of Dauphin County, Pennsylvania, in its decision on exceptions concluded that there was discrimination between companies obtaining fiscal year permission before January 1, 1935 and those obtaining permission thereafter, inasmuch as the Department of Revenue revoked all fiscal year permissions granted to companies subsequent to January 1, 1935, but did not revoke fiscal year permissions granted to like companies prior to January 1, 1935, to file tax reports.

The Supreme Court of Pennsylvania in its decision con-

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cluded that there was no violation of the Federal Constitution by the action of the Secretary of Revenue.

Section 702 of the Act of April 9, 1929, P. L. 343, 72 PS 702, as amended by Act of June 1, 1931, P. L. 318, 72 PS 702, reads as follows:

“Report on Fiscal Year Basis.—If any corporation or association shall certify to the Department of Revenue that its fiscal year closes, not upon the thirty-first day of December, but upon some other date, and that it reports to the United States Government as of such other date, the Department of Revenue may permit such corporation or association to make any capital stock or loans tax report or bonus report required to be made by it, or any of its officers, to the Department of Revenue, within seventy-five days after such date, subject in all other respects to the laws relating to the making of such reports and returns.

The first report made by any corporation or association, changing any return or report from the calendar to the fiscal year basis, shall cover the period from the last day of the calendar year for which a return or report was filed to the first day of the fiscal year, and the Department of Revenue shall settle the tax for such intervening period at the proportionate annual rate provided by law, and also settle the bonus.”

Section 702 of the Act of April 9, 1929, P. L. 343, 72 PS 702, as amended by Act of February 2, 1937, P. L. 3, 72 PS 702, is herein quoted only, because the Supreme Court of Pennsylvania refers to this Amendment in its opinion (R. 256, 257), as follows:

“Report on Fiscal Year Basis.—If any corporation or association (shall certify to the Department

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of Revenue that) closes its fiscal year, (closes) not upon the thirty-first day of December, but upon some other date, and (that it) reports to the United States Government as of such other date, or would so report were it required to make a return to the United States Government, such corporation or association shall certify such fact to the Department of Revenue (may permit such corporation or association to) and shall make any capital stock, franchise, or loans tax report or bonus report required to be made by it, or any of its officers, to the Department of Revenue, within seventy-five days after such date, subject in all other respects to the laws relating to the making of such reports and returns.

The first report made by any corporation or association changing any return or report from the calendar to the fiscal year basis shall cover the period from the last day of the calendar year for which a return or report was filed to the first day of the fiscal year, and the Department of Revenue shall settle the tax for such intervening period at the proportionate annual rate provided by law, and also settle the bonus."

Section 704 of the Act of April 9, 1929, P. L. 343, 72 PS 704, reads as follows:

"Extensions of Time.—The Department of Revenue may, upon application made to it in such form as it shall prescribe, on or prior to the last day for filing any tax report, tax return, or bonus return, grant to the person, association, or corporation, required to file such report or return, an extension of not more than sixty days within which such report or return may be filed without penalty."

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Section 1702 of the Act of April 9, 1929, P. L. 343, 72 PS 1702, as amended by Act of June 1, 1931, P. L. 318, 72 PS 1702:

“Failure of Corporation, Association, Exchange, or Person to Make Bonus or Tax Reports on Time.— If any corporation, association, exchange, or person, or the officer or officers of any corporation, association, or exchange, shall neglect or refuse to furnish to the Department of Revenue, within the time prescribed by law, or any extension thereof granted by the Department of Revenue, any bonus or tax report required by section seven hundred six, seven hundred seven, seven hundred eight, seven hundred ten, seven hundred thirteen, or seven hundred twenty, of this act, it shall be the duty of the Department of Revenue to add to the bonus or tax of such corporation, association, exchange, or person, for each and every tax period for which such report was not so furnished, the following percentages, which (percentage) shall be collected with the bonus or tax in the usual manner of settling and collecting such bonus or tax:

On the first one thousand dollars of bonus or tax, ten per centum; on the next four thousand dollars, five per centum; and on everything in excess of five thousand dollars, one per centum.”

Pertinent part of Section 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of April 25, 1929, 72 PS 1871, showing manufacturers exemption follows:

“Section 21. That every corporation, \* \* \* from which a report is required under the twentieth section hereof, shall be subject to, and pay into the Treasury of the Commonwealth annually, through the Department of Revenue, a tax at the rate of five mills upon each dollar of the actual value of its whole capital

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stock of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in said twentieth section \* \* \*. And provided further, that the provisions of this section shall not apply to the taxation of the capital stock of corporations, \* \* \* organized for \* \* \* manufacturing purposes \* \* \*."

Section 21 of the Act of June 1, 1889, P. L. 420, as amended by the Act of April 25, 1929, was amended by Act of May 16, 1935, P. L. 184, 186, Section 1, 72 PS 1871. The pertinent part thereof follows:

"Section 21 (a) That every *domestic* corporation, \* \* \* from which a report is required under the twentieth section hereof, shall be subject to, and pay into the Treasury of the Commonwealth annually, through the Department of Revenue, a tax at the rate of five mills upon each dollar of the actual value of its whole capital stock of all kinds, including common, special, and preferred, as ascertained in the manner prescribed in said twentieth section.

(c) \* \* \* Provided further, That the tax of five mills, imposed by this section on reports filed for the calendar years one thousand nine hundred and thirty-five and one thousand nine hundred and thirty-six, *or for the fiscal years beginning in the calendar years one thousand nine hundred and thirty-five and one thousand nine hundred and thirty-six*, shall apply to the taxation of the capital stock of corporations, \* \* \* organized for \* \* \* manufacturing purposes, \* \* \*; provided further, that after said two year period, the provisions of this section shall not apply to the taxation of the capital stock of corporations, \* \* \* organized \* \* \* for manufacturing purposes, which is invested in and actually and exclusively employed in, \* \* \* manufacturing within the State, \* \* \*"

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Act of May 16, 1935, P. L. 184, 72 PS 1892 b. The pertinent part of Section 3 of the Act follows:

“Section 3. The provisions of this act shall be retroactive to the first day of January, one thousand nine hundred thirty-five, so that capital stock of domestic corporation \* \* \* organized \* \* \* for manufacturing purposes, shall pay the tax imposed for the calendar years one thousand nine hundred thirty-five and one thousand nine hundred thirty-six, *or for the fiscal years, beginning in the calendar years one thousand nine hundred and thirty-five and one thousand nine hundred and thirty-six in the same fashion as other corporations* \* \* \*”



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## STATEMENT OF FACTS

A. M. Byers Company, a Pennsylvania Corporation, authorized and engaged in manufacturing, facts 2 and 3, (R. 128a), filed its Income Tax Reports with the Federal Government on a fiscal year ended September 30th since October 1, 1918, fact 4, (R. 129a), petitioned for permission to make Pennsylvania State Tax Reports for fiscal year ended September 30th of each year, (R. 134a). November 22, 1935, the Secretary of Revenue granted the permission, (R. 135a), at the end of which permission appeared reference to the mandatory provision of the Act of the General Assembly for filing interim report to cover the period to the first day of the fiscal year, October 1, 1935, (R. 135a). On December 30, 1935, A. M. Byers Company filed a Capital Stock Tax Report with the Pennsylvania Department of Revenue for the nine months ended September 30, 1935, fact 9, (R. 129a, 130a). On February 28, 1936, the Department of Revenue addressed a letter to Counsel for the Petitioner advising that the Department of Revenue had decided to revoke all fiscal year permissions theretofore granted to manufacturing companies which had previously filed their reports to the State on a fiscal year basis, and at the same time returned the Petitioner's Capital Stock Tax Report for the interim period January 1, to September 30, 1935, (R. 136a). On April 7, 1936, Capital Stock Tax Report for the full year 1935, on the basis of fiscal year ended September 30th accounting, was executed and filed under protest, fact 11, (R. 130a). The Petitioner proceeded regularly, refiled the interim report in the Department of Revenue, (R. 68a), Commonwealth's Exhibit 2, (R. 80a), and filed its Appeal from the settlement and resettlement of the tax on the report for the

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year 1935, and the revocation of the fiscal year permission by the Department of Revenue of Pennsylvania, (R. 136a, 137a). June 23, 1941, the Court of Common Pleas of Dauphin County, Pennsylvania, entered judgment in favor of the Commonwealth and against the Defendant, (R. 179a to 184a). July 18, 1941, the A. M. Byers Company filed exceptions to the conclusions of the Trial Judge. September 2, 1941, Petition to Amend the Record was filed in the Court of Common Pleas of Dauphin County, Pennsylvania, (R. 194a, 195a), including additional facts Nos. 23 and 24, (R. 195a, 196a), to which the Deputy Attorney General for the Commonwealth of Pennsylvania agreed, (R. 196a), and on September 2, 1941, the Court granted the prayer of the Petitioner to Amend the Record to include, and included additional facts Nos. 23 and 24, (R. 196a, 197a). January 6, 1942, the Court of Common Pleas of Dauphin County, Pennsylvania sustained the appeal of the A. M. Byers Company and judgment was entered in favor of the Defendant and against the Commonwealth, (R. 200a to 203a). Exceptions were filed by the Commonwealth, duly overruled, and Appeal was taken to the Supreme Court of Pennsylvania. March 29, 1943, the Supreme Court of Pennsylvania reversed the opinion, (R. 253). A. M. Byers Company duly filed Petition for Reargument in the Supreme Court of Pennsylvania, and on May 10, 1943, the Court entered an order, refusing Reargument, (R. 257). This Petition for Certiorari followed.

BASIS OF DECISIONS BELOW

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The Court of Common Pleas of Dauphin County, Pennsylvania accepted as a fact that all fiscal year permissions granted prior to February 28, 1936 for manufacturing companies which had previously filed the reports to the State on the fiscal year basis had been revoked, (R. 180a), and accordingly, found as a conclusion of law that no constitutional questions are involved, and entered judgment in favor of the Commonwealth, (R. 184a). The record was amended by addition of agreed facts 23 and 24, (R. 195a, 196a), Fact No. 23, being contrary to agreed fact No. 10, (R. 130a), the Court of Common Pleas of Dauphin County, Pennsylvania, January 6, 1942 handed down its opinion on exceptions, sustained the appeal on the basis of discrimination, (R. 201a to 203a), and entered judgment in favor of the Defendant and against the Commonwealth, (R. 203a). The Supreme Court of Pennsylvania decided there was no violation of the Federal Constitution by the Department of Revenue, and reversed the decision of the Court of Common Pleas of Dauphin County, Pennsylvania (R. 257). Petition for Reargument was presented to the Court. An answer to the Petition was filed by Respondents. Without opinion the Supreme Court refused to hear reargument, May 10, 1943, (R. 257).

## SPECIFICATION OF ERRORS TO BE URGED

1. The Supreme Court of Pennsylvania erred in holding that the corporation was liable for tax for the year 1935, and that it was not prejudiced nor harmed in any way by the revocation of the fiscal year permission.

2. The Supreme Court of Pennsylvania erred in not holding that the Department of Revenue had no authority to revoke the fiscal year permission, previously granted, after Petitioner had filed its Capital Stock Tax Report for interim period January 1, 1935 to October 1, 1935, as provided in the second paragraph of Section 702 of the Fiscal Code of April 9, 1929, P. L. 343, 72 PS Sec. 702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 702.

3. The Supreme Court of Pennsylvania erred in not holding that the Department of Revenue had no authority to refuse to make a settlement on the interim report from January 1, 1935 to October 1, 1935, as provided in the second paragraph of Section 702 of the Fiscal Code of April 9, 1929, P. L. 343, 72 PS Sec. 702, as amended by Act of June 1, 1931, P. L. 318, 72 PS 702.

4. The Supreme Court of Pennsylvania erred in holding that there was no violation of the Federal Constitution, which error was occasioned because it did not consider the arbitrary action by the Department of Revenue's revoking fiscal year permissions granted subsequent to January 1, 1935, and not revoking fiscal year permissions granted previous to January 1, 1935 for companies admittedly, literally, in the same class,—companies engaged in manufacturing.

## REASONS FOR GRANTING THE PETITION

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1. The present case creates a distinction between companies having been granted permission to file Capital Stock Tax Reports on a fiscal year basis, where the permission was granted subsequent to January 1, 1935 and prior to January 1, 1935 to companies in the same class, by reason of the fact that the permissions granted prior to January 1, 1935 were not revoked. This action prejudiced and harmed companies by creating a discrimination between companies in the same class, and is arbitrary, denying the equal protection of the laws.

2. The Supreme Court of Pennsylvania by subscribing to the distinction between companies of the same class, has sustained that which is an irreconcilable conflict between the action of the Department of Revenue and the mandatory provision of the Act of the General Assembly, requiring Petitioner to file its Capital Stock Tax Report for the interim period from January 1, 1935 to October 1, 1935. If the stamp of approval by the Supreme Court of Pennsylvania on such arbitrary and discriminatory action were permitted to stand, a dangerous precedent would be created which, conceivably, would affect adversely the interests of minorities as well as majorities.

3. The Supreme Court of Pennsylvania, in refusing to make a settlement on the interim Capital Stock Tax Report, compounded the discrimination against the Petitioner, in contravention of the mandatory provision of the Act of the General Assembly, requiring settlement of Capital Stock Tax on reports filed for the interim period, after fiscal year permission to file the report was granted. Such action denies the Petitioner the equal protection of the

laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. The facts shown establish an administration of an Act of the General Assembly by the Public Authorities charged with its administration in a manner so that it operates differently against corporations literally in the same class, which action is so unequal and oppressive so as to amount to a practical denial by a State to the equal protection of the laws which is secured to Petitioner, as to all other corporations, by the broad and benign provision of the Fourteenth Amendment to the Constitution of the United States. *Yick Wo. Plff. v. Peter Hopkins*, 118 U. S. 356, 373, 30 L. ed. 220, 227 (1886).

4. The Supreme Court of Pennsylvania decided the instant case against the Petitioner on a question not raised by the Petitioner, and not involved in the case, that is, that the permission to file report on a fiscal year basis was intended to operate retroactively. Section 2 of the Fiscal Code of the Commonwealth of Pennsylvania, April 9, 1929, P. L. 343, 72 PS 2, shows that the Act is intended to define the powers and duties of the Department of Revenue, and subsequent to said Section 2, there was incorporated in the same Act of the General Assembly Section 702, Act of April 9, 1929, P. L. 343, as amended by Act of June 1, 1931, P. L. 318, 72 PS 702, making it mandatory upon the Petitioner to file its interim report, mandatory upon the Department of Revenue to effect settlement on said report, both of which mandatory provisions were ignored by the Department of Revenue, which was held by the Court of Common Pleas of Dauphin County, Pennsylvania, to be discriminatory action. The action by the Secretary of Revenue, confirmed by the Supreme Court of Pennsylvania, results in denying equal protection of the laws to Petitioner, and is oppressive. Though the law itself is fair on its face and impartial in appearance, yet, if it is

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applied and administered by public authority with an unequal hand, so as practically to make unjust and illegal discriminations between companies in similar circumstances, material to their rights, the denial of equal justice is still within the prohibitions of the Constitution. *Yick Wo. v. Peter Hopkins*, 118 U. S. 356, 373, 30 L. ed. 220, 227 (1886).

5. The present decision is in conflict with the decision in *French v. Edwards*, 80 U. S. 506, 510, 20 L. ed. 703 (1872), so far as interpretation of the language of Section 702 of the Fiscal Code is concerned. It was mandatory upon the Petitioner to file its interim Capital Stock Tax Report, likewise mandatory upon the Department of Revenue to settle the tax on said interim report. If Petitioner had not filed the report within the seventy-five days after October 1, 1935, 72 PS 702, or within sixty days from the extension of time from the seventy-five days, Section 704, Act of April 9, 1929, P. L. 343, 72 PS 704 the interim report having been filed December 30, 1935, Petitioner would have been liable for penalty, Section 1702, Act of April 9, 1929, P. L. 343, as amended by Act of June 1, 1931, P. L. 318, 72 PS 1702. Accordingly, Petitioner had no alternative to filing the interim report, excepting making itself liable for penalty. The provisions of the second paragraph of Section 702, 72 PS 702, are mandatory, *French v. Edwards*, *supra*, *Lion v. Alley*, 130 U. S. 184, 32 L. ed. 902 (1889), *Allis v. United States*, 155 U. S. 125, 128, 129, 39 L. ed. 94, 96 (1894), *Escoe v. Zerbst*, 295 U. S. 493, 494, 79 L. ed. 1569 (1935).

6. It is obvious that the Supreme Court of Pennsylvania erred in sustaining the unwarranted, discriminatory and arbitrary action by the Department of Revenue's revoking fiscal year permissions granted to companies subsequent to January 1, 1935 and not revoking fiscal year

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permissions granted previous to January 1, 1935 to companies admittedly, in the same class. The discrimination cannot be justified by the need of the Commonwealth for revenue, as the Department of Revenue could have avoided discrimination by revoking all fiscal year permissions of all companies in the same class, irrespective of the date when granted, and thus obtained more revenue, if the revocation had been attempted before any corporation was required to file the interim report to avoid penalty.

Wherefore, Your Petitioner prays that a writ of certiorari be issued out of and under the seal of the Supreme Court of the United States, directed to the Supreme Court of Pennsylvania, requiring that Court to certify the record, and the case herein to the Supreme Court of the United States for its review and determination.

A. M. BYERS COMPANY,  
By L. F. RAINS, *Pres.*,  
*Petitioner.*

Attest:

FRANK G. LOVE,  
*Secretary.*  
(Corporate Seal)

WILLIAM M. YOUNG,  
William M. Young,  
*Counsel for Petitioner.*

State of Pennsylvania,  
County of Dauphin, ss:

William M. Young, being duly sworn according to law, deposes and says that he is counsel for the Petitioner herein; that he has read the within petition and knows the con-



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tents thereof, and that the allegations in the said petition are true to the best of his knowledge, information and belief.

WILLIAM M. YOUNG  
William M. Young

Sworn to and subscribed before me this 28th day of July, 1943.

Ada M. Steely,  
*Notary Public.*

(Seal)

My Commission expires May 6, 1944.

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CERTIFICATE OF COUNSEL

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I hereby certify that the foregoing petition is in my opinion well founded and entitled to the favorable consideration of the Supreme Court of the United States, and that it is not filed for the purpose of delay.

WILLIAM M. YOUNG,  
William M. Young,  
*Counsel for Petitioner.*

*Specifications of Error***SUPREME COURT OF THE UNITED STATES**

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..... Term, 1943

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No.

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COMMONWEALTH OF PENNSYLVANIA

vs.

A. M. BYERS COMPANY,

*Petitioner.*

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**BRIEF IN SUPPORT OF PETITION FOR WRIT  
OF CERTIORARI**

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**SPECIFICATIONS OF ERROR**

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The Supreme Court of Pennsylvania erred in the following respects:

1. The Supreme Court of Pennsylvania erred in holding that the corporation was liable for tax for the year 1935, and that it was not prejudiced nor harmed in any way by the revocation of the fiscal year permission.

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2. The Supreme Court of Pennsylvania erred in not holding that the Department of Revenue had no authority to revoke the fiscal year permission, previously granted,

*Specifications of Error*

after Petitioner had filed its Capital Stock Tax Report for interim period January 1, 1935 to October 1, 1935, as provided in the second paragraph of Section 702 of the Fiscal Code of April 9, 1929, P. L. 343, 72 PS Sec. 702, as amended by Act of June 1, 1931, P. L. 318, 72 PS 702.

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3. The Supreme Court of Pennsylvania erred in not holding that the Department of Revenue had no authority to refuse to make a settlement on the interim report from January 1, 1935 to October 1, 1935, as provided in the second paragraph of Section 702 of the Fiscal Code of April 9, 1929, P. L. 343, 72 PS Sec. 702, as amended by Act of June 1, 1931, P. L. 318, 72 PS 702.

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4. The Supreme Court of Pennsylvania erred in holding that there was no violation of the Federal Constitution, which error was occasioned because it did not consider the arbitrary action by the Department of Revenue's revoking fiscal year permission granted subsequent to January 1, 1935, and not revoking fiscal year permissions granted previous to January 1, 1935 for companies admittedly, literally, in the same class—companies engaged in manufacturing.

## ARGUMENT

1. The action of the Department of Revenue, sustained by the Supreme Court of Pennsylvania, that the corporation was liable for tax for the year 1935 deprives the corporation of property without due process of the laws, and denies to it the equal protection of the laws.

Obviously, Section 3 of the Act of May 16, 1935, P. L. 184, 72 PS 1892 b, makes corporations organized for manufacturing purposes liable for Capital Stock Tax for only two years, either two calendar years 1935 and 1936 or for the fiscal years beginning in the calendar years 1935 and 1936. There is no provision in the 1935 Act for settling tax for a portion of the year on a calendar year basis and the remainder of the period to total twenty-four months, or two years, on a fiscal year basis. The apportionment of taxes on a uniform basis, is, therefore, met by imposing tax in this case for the two fiscal years beginning in the calendar years 1935 and 1936. This was recognized by the opinion of the Court of Common Pleas of Dauphin County, Pennsylvania, on exceptions, (R. 201a, 202a).

There is no denial that classifications of corporations may be made by the Legislature but Section 702 of the Fiscal Code, Act of April 9, 1929, P. L. 318, 72 PS 702, as amended by Act of June 1, 1931, P. L. 318, 72 PS 702, does not provide for classification of corporations. Neither does it permit classification by the Department of Revenue of corporations filing on fiscal year basis, warranting revoking fiscal year permissions granted to certain manufacturing corporations subsequent to January 1, and not revoking like permissions granted to manufacturing corporations prior to January 1 of any year.

*Argument*

Petitioner does not claim an exemption from Capital Stock Tax for the first nine months of 1935 to October 1, because of any fiscal year ending September 30, 1935, but because the first fiscal year began October 1, 1935, it was liable for tax without manufacturing exemption, for the two fiscal years beginning in 1935 and 1936, as like corporations whose fiscal years began any time during 1935 and 1936, in accordance with Section 3 of the 1935 Act, *supra*.

2. The Supreme Court of Pennsylvania should have followed the decision of the Court of Common Pleas of Dauphin County, Pennsylvania, on exceptions.

The decision of the Supreme Court of Pennsylvania that Section 702 of the Act of April 9, 1929, P. L. 343, 72 PS 702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 702 provides for *permissive* action by the Department of Revenue relates only to the first paragraph of the Section, and contains not one reference of the mandatory provisions of the second paragraph. Proof of the mandatory effect of the second paragraph of Section 702 of the Fiscal Code appears clear from the reading of the Supreme Court's opinion, (R. 256, 257), which refers to the fact that, February 2, 1937, Section 702 was amended, which makes it mandatory that corporations reporting to the United States on a fiscal year basis report upon the same basis for State taxation. The only changes in Section 702 were in the first paragraph, and the only relative change was the elimination of the word "may" and substituting therefor the word "shall". The word "shall", appearing in the third and the sixth lines of the second paragraph, was there before the 1937 Amendment to the Fiscal Code. The inconsistency in the decision of the Supreme Court of Pennsylvania is obvious.

The Supreme Court of the United States decided that

*Argument*

a gross receipts tax, imposed on the gross receipts of incorporated operators but not on the gross receipts of natural persons and partnerships carrying on the same business unconstitutionally deprives the corporations of the equal protection of the laws, because the character of the owner was the sole fact on which the distinction and discrimination were made to depend, *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389, 402, 72 L. ed. 927, 930, (1928).

There is not any difference in the character of the corporation in the case of the Petitioner and other corporations in Petitioner's class, but the Secretary of Revenue of Pennsylvania revoked the fiscal year permissions of all corporations, including the Petitioner, having been granted since January 1, 1935, and did not revoke the fiscal year permissions of any corporation, literally, of the same class, granted prior to January 1, 1935, to file Capital Stock Tax Reports on a fiscal year basis. The discrimination against the Petitioner is obviously a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of the United States decided that a statute imposing an attorney's fee not to exceed \$10.00 in addition to costs, upon railway corporations omitting to pay certain claims within a certain time after presentation, which applies to no other corporations or individuals, was a classification not based upon reasonable ground—some difference which bears a just and proper relation to the attempted classification, but a mere arbitrary selection, and, therefore, was a violation of the equality clause of the Fourteenth Amendment, *Gulf, Colorado, & Santa Fe Railway Company v. W. H. Ellis*, 165 U. S. 150, 165, 41 L. ed. 666, 672, (1897).

The same is true in the case of the Petitioner. The

*Argument*

selection to revoke fiscal year permissions was merely arbitrary.

3. The Supreme Court of Pennsylvania denied the petitioner the due process and the equal protection of the laws in its opinion in failing to conclude that the Department of Revenue had no authority to refuse to make the settlement on the interim report.

Decision of the Supreme Court of Pennsylvania to the effect that granting or revoking the permission to file on a fiscal year is permissive under the first paragraph of Section 702 of the Fiscal Code was never contested, and was not, and is now not in question, but the reference by the Court to Section 702 of the Fiscal Code, as amended in 1937, 72 PS 702, to sustain the conclusion that the action under the first paragraph of the Section is permissive, as the 1937 Act changed the word "may" to the word "shall", making it mandatory to file fiscal year reports under the 1937 Amendment, is equally applicable here to show that the word "shall" appearing in the third and sixth lines of the second paragraph of Section 702 as it existed during 1935, meant "mandatory".

Section 2, of the Fiscal Code of April 9, 1929, P. L. 343, 72 PS 2, indicates that the act (meaning the Fiscal Code) is intended to define the powers and duties of the Department of Revenue. This aids in an interpretation of Section 702, in that the Department of Revenue "may permit" corporations to make any Capital Stock Tax Report on a fiscal year basis. This is covered by the word "power" in the first paragraph of Section 2. The second paragraph of Section 702 of the 1929 Act, as amended in 1931, indicates that the first report made by any corporation changing a report from a calendar to a fiscal year basis shall cover the period from the last day of the calendar year, and the Department of Revenue shall settle the tax on the interim re-

*Argument*

port. This is covered by the word "duty" upon the corporation to file the report, and a "duty" upon the the Department of Revenue to settle the tax for such intervening period, "a duty" defined pursuant to Section 2 of the Fiscal Code, and, therefore, both the action of the corporation filing the report and the duty of the Department of Revenue to make the settlement are "mandatory". The opinion of the Supreme Court of Pennsylvania (R. 256) states that no administrative officer or body, exercising discretion conferred by the legislation is vested with the power to abrogate the statute law of the Commonwealth. This principle of law is correct, but has been erroneously applied by the Supreme Court. The fiscal year permission was intended to operate prospectively beginning October 1, 1935, and this corporation was liable for Capital Stock Tax, without manufacturing exemption, for the two fiscal years beginning October 1, 1935 and October 1, 1936, as provided in Section 3 of the Act of May 16, 1935, P. L. 184, 72 PS 1892 b. But the principle expressed by the Supreme Court of Pennsylvania is applicable to the conclusion that the Department of Revenue, the administrative body, is not vested with the power to abrogate the statute law of the Commonwealth, as it applies to the second paragraph of Section 702 of the Fiscal Code, April 9, 1929, P. L. 343, 72 PS 702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 702, which contains the mandatory provision for the corporations filing the interim report and the settlement thereon by the Department of Revenue.

An ordinance in San Francisco, California, required laundry operators to obtain consent of the Board of Supervisors if their operations were to be carried on in buildings not constructed of brick or stone. A Chinaman operating a laundry in a wooden building applied for and was refused consent of the Board, but operated a laundry, was arrested and found guilty of violating the ordinance. The



*Argument*

facts in the case showed that the Chinaman was carrying on the business without having such special consent, as was true of more than 150 other Chinamen, while those who were not subjects of China, and who were conducting 80 odd laundries under similar conditions, were left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The Supreme Court of the United States, reversing the Circuit Court, said that constitutional laws administered despotically leave no less odious results than the administration of unconstitutional laws. The results are the same, and the Constitution of the United States guarantees equal protection in both cases, *Yick Wo. v. Peter Hopkins*, 118 U. S. 356, 373, 30 L. ed. 220, 227, (1886).

The filing the interim report was necessary for the protection of the Petitioner. Otherwise, it would have been subjected to penalty for late filing the report, as provided in Section 1702 of the Fiscal Code, Act of April 9, 1929, P. L. 343, 72 PS 1702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 1702. The Petitioner did not have any alternative to filing the interim report, unless Petitioner's Officers wanted it to be subjected to a penalty under the law. It would have been, obviously, unreasonable to expect Petitioner not to act until seventy-five days after October 1, 1935 had expired, first paragraph of Section 702, Act of April 9, 1929, P. L. 343, 72 PS 702, as amended by the Act of June 1, 1931, P. L. 318, 72 PS 702,—seventy-five days expired December 15, and the expiration of the sixty day extension, Section 704, Act of April 9, 1929, P. L. 343, 72 PS 704,—or February 15, to learn whether the Department of Revenue intended to revoke the fiscal year permission, regularly granted. The record shows that the Department of Revenue attempted to revoke the fiscal year permission February 28, 1936, (R. 26a, 27a).

*Argument*

Disregard of the second paragraph of Section 702 of the Fiscal Code, as amended during 1931, obviously injuriously affects the property rights of the Petitioner, and it was incumbent upon the Petitioner to act for its protection and to prevent the sacrifice of its property. Accordingly, the filing the interim report was mandatory, and the provision requiring settlement on the report by the Department of Revenue was mandatory.

A statute of California provided that in case of delinquent taxes, so much of the property as may be necessary to pay the delinquent taxes and the cost shall be offered for sale, and the proceeds applied to pay the judgment and cost. The officer departed from the requirements of the statute and sold the entire tract of land. The Supreme Court of the United States concluded that the statutory requisition should not have been disregarded, and that, accordingly, the judgment must be reversed, inasmuch as the requirement was intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights would be injuriously affected, *French v. Edwards*, 80 U. S. 506, 20 L. ed. 703, (1872).

4. The Supreme Court of Pennsylvania erroneously concluded that there was no violation of the Federal Constitution in the revocation of the fiscal year permission granted subsequent to January 1, 1935.

Fiscal year permissions granted to Pennsylvania manufacturing corporations prior to January 1, 1935 were not revoked, but all fiscal year permissions granted subsequent to January 1, 1935 to manufacturing corporations for filing Capital Stock Tax Reports were revoked.

Equal protection of the laws require that all persons subjected to legislation shall be treated alike, under like circumstances and conditions, both in the privileges confer-

red and in the liabilities imposed, *Magoun v. Illinois Trust & Saving Bank*, 170 U. S. 283, 293, 42 L. ed. 1937, 18 Sup. Ct. 594, (1898).

The immediately aforementioned legal principle is applicable inasmuch as manufacturing corporations having been granted fiscal year permission subsequent to January 1, 1935 were not treated the same as those granted fiscal year permission prior to January 1, 1935, under like circumstances and conditions. Section 3 of the Act of May 16, 1935, P. L. 184, 72 PS 1892 b, provides that corporations organized for manufacturing purposes shall be taxed, without manufacturing exemption for the two calendar years 1935 and 1936 or for the two fiscal years beginning in 1935 and 1936. Accordingly, Petitioner is subject to tax without manufacturing exemption only for the two fiscal years beginning October 1, 1935 and October 1, 1936, the same as like corporations which were granted fiscal year permission prior to January 1, 1935.

The doings of those charged with the administration of the statute may be unlawful while the statute itself is valid, *Cummings v. Merchants National Bank of Toledo*, 101 U. S. 154, 161, 25 L. ed. 903, (1880).

Wherefore, it is respectfully submitted that this Petition should be granted.

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